

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of Application of )  
 )  
BAKER CREEK COMMUNICATIONS, L.P. ) File No. 0000000111  
 )  
For Authority to Construct and Operate )  
Local Multipoint Distribution Services In )  
Multiple Basic Trading Areas )

**ORDER**

**Adopted: July 15, 1999**

**Released: July 15, 1999**

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. By this *Order*, we find that Baker Creek Communications, L.P. (Baker Creek) is in default and thus subject to the default payment obligations set forth herein. This action is based on Baker Creek's default on its obligation to make final payments on thirty-seven Local Multipoint Distribution Service (LMDS) licenses for which it was the high bidder in the first LMDS auction (Auction No. 17), which was completed on March 25, 1998.<sup>1</sup> In addition, we modify Baker Creek's withdrawal payment obligations resulting from its withdrawal of seventeen standing high bids in Auction No. 17.<sup>2</sup>

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<sup>1</sup> The 37 licenses on which Baker Creek has defaulted correspond to the following Basic Trading Areas (BTAs): B005 (Adrian, MI); B011 (Alpena, MI); B033 (Battle Creek, MI); B039 (Benton Harbor, MI); B046 (Bloomington, IL); B066 (Cape Girardeau-Sikeston, MO); B067 (Carbondale-Marion, IL); B070 (Cedar Rapids, IA); B086 (Clinton, IA-Sterling, IL); B090 (Columbia, MO); B109 (Decatur-Effingham, IL); B142 (Fergus Falls, MN); B145 (Flint, MI); A160 (Gainesville, GA); A161 (Galesburg, IL); B169 (Grand Rapids, MI); A178 (Greenwood, SC); B209 (Jackson, MI); A213 (Jacksonville, IL); A217 (Jefferson City, MO); B223 (Kalamazoo, MI); A235 (Lafayette, IN); B241 (Lansing, MI); B277 (Mankato-Fairmont, MN); B307 (Mt. Pleasant, MI); B308 (Mt. Vernon-Centralia, IL); B310 (Muskegon, MI); B344 (Peoria, IL); B355 (Poplar Bluff, MO); A373 (Richmond, IN); B378 (Rochester-Austin-Albert Lea, MN); B383 (Rolla, MO); A384 (Rome, GA); B414 (Sedalia, MO); B426 (Springfield, IL); B462 (Waterloo-Cedar Falls, IA); B470 (West Plains, MO).

<sup>2</sup> The 17 licenses on which Baker Creek withdrew its high bid in Auction No. 17 correspond to the following BTAs: B011 (Alpena, MI); B061 (Burlington, IA); B070 (Cedar Rapids, IA); B086 (Clinton, IA-Sterling, IL); B119 (Duluth, MN); B134 (Eureka, CA); B142 (Fergus Falls, MN); B166 (Grand Forks, ND); B277 (Mankato-Fairmont, MN); B279 (Marinette, WI-Menominee, MI); B283 (Marshalltown, IA); B285 (Mason City, IA); B327 (Odessa, TX); B378 (Rochester-Austin-Albert Lea, MN); B389 (Sacramento, CA); B462 (Waterloo-Cedar Falls, IA); B481 (Worthington, MN).

## II. BACKGROUND

2. On March 25, 1998, the Auctions and Industry Analysis Division (Auctions Division) completed the auction of 986 LMDS Licenses.<sup>3</sup> Baker Creek was the high bidder for 232 of these LMDS licenses.<sup>4</sup> Baker Creek claimed on short-form application (FCC Form 175) that it was a "very small business," eligible for a 45 percent bidding credit.<sup>5</sup> Accordingly, Baker Creek was listed publicly as a winning bidder in Auction No. 17 with both its gross and net high bids recorded.<sup>6</sup> On April 16, 1998, the Public Safety and Private Wireless Division (Division) issued a Public Notice listing Baker Creek's long-form application for licenses to operate LMDS facilities in the BTAs where it was the high bidder as "accepted for filing."<sup>7</sup> On May 18, 1998, another LMDS bidder filed a Petition to Deny (Petition) against the grant of the licenses for which Baker Creek had successfully bid in Auction No. 17.<sup>8</sup> On September 22, 1998, the Division granted the Petition to the extent that Baker Creek was declared ineligible to receive the bidding credits it claimed in Auction No. 17, while granting Baker Creek's licenses on the condition that Baker Creek pay for those licenses in full (*i.e.*, the full gross amount bid by Baker Creek) by October 6, 1998.<sup>9</sup> On September 28, 1998, Baker Creek sought suspension of the October 6, 1998, payment deadline.<sup>10</sup> In addition to the suspension of the payment deadline, Baker Creek also sought clarification of a number of regulatory issues pertaining to its default obligations and sought leave to pursue alternative forms of relief.<sup>11</sup> On September 30, 1998, the Wireless Telecommunications Bureau granted Baker Creek an additional twenty days, until October 26, 1998, to make its payments but deferred a decision on the other issues.<sup>12</sup> On October 14, 1998, the Auctions Division denied Baker Creek's requested relief from the default payment rules which it sought in its September

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<sup>3</sup> See LMDS Auction Closes, Auction No. 17, DA 98-572, *Public Notice*, 13 FCC Rcd 18217, at Attachment A (1998) (*LMDS Closing Auction PN*).

<sup>4</sup> *Id.*

<sup>5</sup> A "very small business" is an entity that has average gross revenues for the three years preceding the filing of its FCC Form 175 of \$15 million or less. Very small businesses that participated in the LMDS auctions were eligible for bidding credits of 45% to lower the cost of their winning bids. 47 C.F.R. §§ 101.11112(b).

<sup>6</sup> *LMDS Closing Auction PN*, 13 FCC Rcd 18217, at Attachment A. The gross bid is the dollar amount bid by a high bidder, exclusive of any bidding credit. The net bid is the dollar amount bid including the bidding credit for which a high bidder is eligible under the Commission's Rules.

<sup>7</sup> Local Multipoint Distribution Service Application Accepted for Filing, Auction No. 17, DA 98-740, *Public Notice*, 13 FCC Rcd 10947 (April 16, 1998).

<sup>8</sup> Nextband Communications L.L.C. Petition to Dismiss or Deny or in the Alternative, to Institute an Inquiry (filed May 18, 1998).

<sup>9</sup> Baker Creek Communications, L.P., DA 98-1921, *Memorandum Opinion and Order*, 13 FCC Rcd 18709, 18727-29 (1998) (*MO&O*).

<sup>10</sup> Letter from James F. Ireland, Cole Raywid & Braverman, L.L.P., to Daniel Phythyon, Chief, Wireless Telecommunications Bureau (WTB), Federal Communications Commission (FCC), dated Sept. 28, 1998.

<sup>11</sup> *Id.* at 7.

<sup>12</sup> Letter from Kathleen O'Brien Ham, Deputy Chief, WTB, to James F. Ireland, Esq., Cole Raywid & Braverman, L.L.P., dated Sept. 30, 1998.

28, 1998, letter.<sup>13</sup> On October 23, 1998, Baker Creek indicated its intention to default on thirty-seven LMDS licenses and stated that it would make full payment on the remaining 195 LMDS licenses it won at auction and deposit a three percent initial default payment for the licenses on which it would default.<sup>14</sup> On October 26, 1998, Baker Creek paid a total of \$2,087,416 to the U.S. Treasury, of which the FCC applied \$2,024,793.52 as full payment for 195 LMDS licenses and \$62,622.48 as a three percent initial default payment for the thirty-seven defaulted licenses. On April 27, 1999, the FCC commenced the second LMDS auction, Auction No. 23, which was completed on May 14, 1999. At the conclusion of Auction No. 23, there were high bidders for all of the licenses on which Baker Creek had defaulted.<sup>15</sup>

### III. DISCUSSION

3. Under the Commission's Rules, if a winning bidder fails to remit the balance of its winning bid, it will be deemed to have defaulted on its auction payment obligations.<sup>16</sup> The Commission's Rules further provide that a defaulter is subject to a default payment calculated based on Section 1.2104(g) of the Commission's Rules.<sup>17</sup> The default payment is comprised of two components, which are added together to calculate the full default payment. The first component of the default payment is the difference between the gross defaulted bid and the gross subsequent winning bid, or the difference between the net defaulted bid and the subsequent net winning bid, whichever is less.<sup>18</sup> In the event that the difference between either the gross bids or the net bids, as calculated above, is less than or equal to zero, the first component of the default payment will be set to zero. The second component of the default payment is computed by multiplying the subsequent winning bid or the defaulted bid, whichever is less, by three percent.<sup>19</sup> When a bidding credit applies to the winning bid from either the original or the subsequent auction, the calculation of the second component of the default payment is based on the smaller of the two gross bids or smaller of the two net bids, whichever basis (gross or net) was used to figure the first component of the default payment.<sup>20</sup> Thus, if the difference between the gross bids is less than the difference between the net bids, the second component of the default payment will be computed on the lower of the gross bids. If the difference between the net bids is less than or equal to the difference between the gross bids, the second component of the default payment will be computed on the lower of the net bids. However, if the differences between both the gross bids and the net bids are less than or equal to zero, the second component of the default payment will be computed on the lower of the net bids.

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<sup>13</sup> Letter From Amy Zoslov, Chief, Auctions Division, WTB, to James F. Ireland, Esq., Cole Raywid & Braverman, L.L.P., dated Oct. 14, 1998.

<sup>14</sup> Letter from Theresa A. Zeterberg, Cole Raywid & Braverman, to Amy Zoslov, Chief, Auctions Division, WTB, dated Oct. 23, 1998.

<sup>15</sup> Local Multipoint Distribution Service Auction Closes, DA 99-927, *Public Notice*, at Attachments A & D (1999) (*Auction No. 23 PN*).

<sup>16</sup> 47 C.F.R. § 1.2109(c); National Telecom PCS, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 10163, 10171-72 (1997); Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 434 (1997).

<sup>17</sup> 47 C.F.R. § 1.2104(g).

<sup>18</sup> 47 C.F.R. § 1.2104(g)(1).

<sup>19</sup> See 47 C.F.R. § 1.2104(g)(2).

<sup>20</sup> *Id.*

4 Baker Creek failed to make final payment on thirty-seven LMDS licenses for which it was the high bidder in Auction No. 17. Accordingly, Baker Creek is, pursuant to Section 1.2109 of the Commission's Rules,<sup>21</sup> subject to the default payment obligations set forth under Section 1.2104(g) of the Commission's Rules.<sup>22</sup> Because the Division determined that Baker Creek was ineligible for bidding credits in Auction No. 17, under the rule as described in paragraph 3, Baker Creek's gross bid amounts are used as a basis to determine its default payments. The subject licenses were won by high bidders in Auction No. 23 for gross amounts greater than Baker Creek's gross bids for these licenses in Auction No. 17.<sup>23</sup> Consequently, we find that Baker Creek is liable for default payments equal to three percent of its gross bids for the thirty-seven licenses on which it defaulted. Baker Creek is, therefore, assessed a total default payment of \$62,622.48.<sup>24</sup> Accordingly, Baker Creek's initial default payment of \$62,622.48 will be applied as its full default payment for the thirty-seven licenses on which it defaulted in Auction No. 17.

5. In addition, Baker Creek is subject to an additional withdrawal payment for seventeen licenses on which it withdrew high bids in Auction No. 17. The Commission's Rules provide that a bidder that withdraws a high bid during the course of an auction is subject to a payment equal to the difference between the amount of the bid withdrawn and the amount of the subsequent winning bid.<sup>25</sup> This payment is deducted from any upfront payments or down payments the withdrawing bidder has deposited with the Commission.<sup>26</sup> However, no withdrawal payment is assessed if the subsequent winning bid exceeds the withdrawn bid.<sup>27</sup>

6. At the conclusion of Auction No. 17, Baker Creek was assessed a withdrawal payment of \$18,810 based on its net high bid amount for sixteen of these licenses, that included a 45% bidding credit for which Baker Creek claimed eligibility as a very small business.<sup>28</sup> These licenses were subsequently won by high bidders in Auction No. 17.<sup>29</sup> Because Baker Creek was subsequently denied eligibility for a 45% bidding

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<sup>21</sup> 47 C.F.R. § 1.2109.

<sup>22</sup> 47 C.F.R. §§ 1.2104(g)(1)-(2); 1.2107(c); see *Tel-com Wireless Cable TV, Order*, 12 FCC Rcd 6747 (1997) (permitting an auction winner who won three licenses to pay for two licenses and default on the third).

<sup>23</sup> See *Auction 23 PN* at Attachment D.

<sup>24</sup> We note that Attachment D to the *Auction No. 23 PN* erroneously lists Baker Creek's total default payment amount as \$60,121.77. See Attachment A hereto for calculation of Baker Creek's total default payment obligation.

<sup>25</sup> 47 C.F.R. § 1.2104(g)(1).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> See *LMDS Closing Auction PN*, 13 FCC Rcd. 18217, at Attachment C.

<sup>29</sup> *Id.*; see also FCC Announces the Conditional Grant of Local Multipoint Distribution Services Licenses, Auction Event No. 17, DA 98-1077, *Public Notice*, 13 FCC Rcd 16518, at Attachment A (1998); FCC Announces Conditional Grant of 199 Local Multipoint Distribution Service Licenses, Auction Event No. 17, DA 98-1169, *Public Notice*, at Attachment A (1998); FCC Announces the Conditional Grant of 25 Local Multipoint Distribution Service Licenses, Auction Event No. 17, DA 98-1226, 13 FCC Rcd 17186, at Attachment A (1998); FCC Announces the Conditional Grant of 51 Local Multipoint Distribution Service Licenses, Auction Event No. 17, DA 98-1591, *Public Notice*, 13 FCC Rcd 15415, at Attachment A (1998); FCC Announces the Conditional Grant of 265 Local Multipoint Distribution Service Licenses and the Dismissal of One Application, Auction Event No. 17, DA 98-1748, *Public Notice*, at Attachment A (1998).

credit, its withdrawal payments are revised. By applying the rule, Baker Creek's revised withdrawal payments are based on its gross withdrawn bids, rather than its net withdrawn bids. As a result, the recalculated bid withdrawal payments for Auction No. 17 for these sixteen licenses total \$43,200.<sup>30</sup>

7. In Auction No. 17, Baker Creek also withdrew its high bid for one license which was not won by a high bidder in that auction.<sup>31</sup> Consequently, a three percent deposit of \$235.26 on this license, based on Baker Creek's net withdrawn bid, was retained by the Commission, pending the completion of Auction No. 23.<sup>32</sup> In Auction No. 23, a bidder submitted a high bid for the Eureka License that exceeded Baker Creek's bid in Auction No. 17. As previously stated,<sup>33</sup> a withdrawal payment is not assessed if the subsequent winning bid exceeds the withdrawn bid. Thus, \$235.26 will be credited to Baker Creek.

#### IV. CONCLUSION

8. As discussed herein, a total amount of \$19,045.26 was retained from Baker Creek's \$10,000,000 upfront payment amount as its bid withdrawal payment.<sup>34</sup> Because Baker Creek's designated entity status was later denied,<sup>35</sup> and the subject licenses were subsequently awarded, Baker Creek's withdrawal payment must be recalculated. Consequently, the adjustment to Baker Creek's withdrawal payment, as set forth in Attachment B, is \$43,200. Accordingly, Baker Creek now owes an additional withdrawal payment of \$24,154.74.

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<sup>30</sup> See para. 8 *infra*.

<sup>31</sup> The subject license corresponds to BTA B134 (Eureka, CA) (Eureka License). See *Auction No. 23 PN* at Attachment E.

<sup>32</sup> Because the Eureka License was not sold in Auction No. 17, Baker Creek's withdrawal payment for this license could not be determined until this license was offered in Auction No. 23. See 47 C.F.R. § 1.2104(g).

<sup>33</sup> See para. 5 *supra*.

<sup>34</sup> See *LMDS Closing Auction Closes PN*, 13 FCC Rcd 18217, at Attachment B. The \$19,045.26 includes the \$18,810 withdrawal payment assessment for the licenses that were sold in Auction No. 17, plus \$235.26, which was assessed as a three percent deposit on the Eureka License.

<sup>35</sup> See *MO&O* at 18728-29.

**V. ORDERING CLAUSES**

9. IT IS ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 309, and Section 1.2104 of the Commission's Rules, 47 C.F.R. § 1.2104, that the application, file No. 0000000111, filed on April 9, 1998, by Baker Creek Communications, L.P., is DISMISSED to the extent that it relates to the subject BTAs.

10. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.2109(c) and 1.2104(g) of the Commission's Rules, 47 C.F.R. §§ 1.2109(c), 1.2104(g), that Baker Creek Communications, L.P., is assessed a default payment in the amount of \$62,622.48.

11. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(g), and Section 1.2104(g) of the Commission's Rules, 47 C.F.R. § 1.2104(g), that the default payment shall be applied from Baker Creek Communications, L.P.'s default payment deposit of \$62,622.48.

12. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.2104(g) of the Commission's Rules, 47 C.F.R. § 1.2104(g), that Baker Creek Communications, L.P.'s outstanding liability for bid withdrawal payments for licenses on which it withdrew high bids in Auction No. 17 is \$24,154.74.

13. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that payment of the total amount due and owing of \$24,154.74 is to be made in accordance with the instructions set forth in Attachment C to this *Order* within thirty days from the release of this *Order*.

14. This action is taken pursuant to delegated authority granted under the provisions of Sections 4(i) and 5(c)(1) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(1), and Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry  
Chief, Public Safety and Private Wireless Division  
Wireless Telecommunications Bureau